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7 AMBER KRISTI MARSH, et al.,
8 Plaintiffs,
9 v.
10 FIRST BANK OF DELAWARE, et al.,
11 Defendants.

Case No. [11-cv-05226-WHO](#)

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**ORDER GRANTING PLAINTIFF'S
MOTION FOR CLASS
CERTIFICATION AND
APPOINTMENT OF CLASS COUNSEL
AND DENYING DEFENDANTS JACK
HENRY & ASSOCIATES AND FIRST
NATIONAL BANK OF CENTRAL
TEXAS'S MOTION TO STRIKE CLASS
ALLEGATIONS**

Re: Dkt. Nos. 208, 214

Plaintiff Amber Kristi Marsh moves that the Court certify under Federal Rule of Civil Procedure 23 a nationwide class and a California class of all individuals injured through the use of remotely created checks ("RCC") drafted by defendant Jack Henry & Associates, Inc. ("Jack Henry"), and deposited with defendant First National Bank of Central Texas ("FNBCT"). Marsh also seeks to be appointed as class representative and to have her attorneys appointed as class counsel.

Jack Henry and FNBCT move that the Court strike the class allegations.

For the reasons below, the motion to certify is GRANTED IN PART and DENIED IN PART. The motion to strike is DENIED AS MOOT.

BACKGROUND

Marsh and plaintiff Stacie Evans¹ allege the following:

Defendants ZaaZoom Solutions, LLC, Zaza Pay LLC, MultiECom, LLC, and Online Resource Center, LLC (collectively, the "ZaaZoom Defendants"), "lured" people into applying for

¹ Evans does not bring this motion.

1 payday loans on Internet websites, after which they take the information from the payday loan
2 applications—including the applicants' banking information—to enroll the applicants in online
3 coupon membership programs. Third Amended Complaint ("TAC") ¶ 1. The coupon programs
4 charged a monthly membership fee, for which members could download coupons from the
5 programs' websites, which could be redeemed with various merchants. TAC ¶¶ 57-59. Without
6 disclosing that they were doing so and without the applicants' knowledge or consent, the
7 ZaaZoom Defendants created RCCs in the applicants' names, which drew from the applicants'
8 bank accounts to pay for the coupon programs. TAC ¶ 1.

9 A brief explanation of checks and RCCs is warranted. A typical check is a draft drawn on
10 a bank, payable on demand, and which is signed by the drawer. The drawer is the person who
11 writes the check; the payee is the person to whom the check is made payable; and the drawee or
12 payor bank is the bank with which the drawer has a checking account and from which the check is
13 paid. A check is an order to the drawee bank to pay the amount on the face of the check to the
14 payee. Motion for Class Certification ("MFCC") Br. 2.

15 Upon receiving a check, the payee typically signs the back of the check and deposits the
16 check at his or her own bank, the depository bank. The depository bank then credits the check to
17 the payee's account and sends the check through a check clearing system to the drawee bank for
18 payment from the drawer's account through a process called settlement. MFCC Br. 3.

19 Checks are typically written by the drawer. In contrast, an RCC looks like a traditional
20 check, but is created by a third party under the authority of the drawer to charge the drawer's bank
21 account. MFCC Br. 3. For that reason, an RCC does not bear the drawer's signature as a
22 traditional check does. An RCC allows for transactions such as automatic billing.

23 Like traditional checks, after evaluating the authenticity of the RCC, the payee's bank (also
24 the depository bank) sends the RCC to the drawee bank for settlement. If the drawee bank accepts
25 the check, it will transfer funds to the drawee bank for settlement. The drawee bank will then
26 deposit those funds into the payee's account. MFCC Br. 3. If an RCC is not honored by the payor
27 bank, the check is "returned." Checks may be returned for any number of reasons, e.g., if the
28 drawer account has insufficient funds or if the check is a forgery. MFCC Br. 4-5.

1 The ZaaZoom Defendants worked with defendants Jack Henry, Data Processing Systems,
2 LLC (“DPS”), and Automated Electronic Checking, Inc. (collectively, the “Processors”), who
3 collectively worked as payment processors, to draft the checks. TAC ¶ 2. Defendants FNBCT
4 and First Bank of Delaware (“FBD”) (collectively, the “Depository Banks”) collectively worked
5 to deposit and settle the checks. *See* TAC ¶ 2. The Processors and Depository Banks ignored
6 suspicious signs of potential wrongdoing, such as the fact that the ZaaZoom Defendants’ checks
7 had a return rate over 100 times the national average. TAC ¶¶ 72-73.

8 While a person can voluntarily enroll in a coupon membership program by entering his or
9 her contact and financial information onto the program’s website, the plaintiffs allege that they
10 were unknowingly and involuntarily enrolled in membership programs in conjunction with
11 applications they made for payday loans. MFCC Br. 5-6; Evans Decl. ¶ 9; Marsh Decl. ¶ 9. The
12 plaintiffs had to enter their checking account numbers and bank routing numbers when applying
13 for the loans. MFCC Br. 6; Evans Decl. ¶ 5; Marsh Decl. ¶ 5. The ZaaZoom Defendants then
14 enrolled the plaintiffs without their knowledge in a coupon membership program using the
15 information the plaintiffs provided in their payday loan application. MFCC 6. The information
16 was given to a processor, such as Jack Henry, which drafted RCCs from the plaintiffs’ checking
17 accounts payable to the ZaaZoom Defendants. MFCC 6. The Processors would then deposit the
18 RCC into an account with the Depository Banks. In the case of Jack Henry, Jack Henry would
19 deposit the RCCs into its bank account at FNBCT. MFCC 6 (citing Rosenfeld Decl. ¶¶ 37-38,
20 Exs. 20-21). If a loan applicant’s account had enough money, a membership fee was withdrawn to
21 pay for the coupon program; if the account did not have enough money, the RCC was returned,
22 but the account holder is often charged a bank account fee for insufficient funds. MFCC 6.

23 Jack Henry is a Delaware corporation based in Monett, Missouri. TAC ¶ 31. Around
24 November 2010, Jack Henry began serving as a Processor for the ZaaZoom Defendants, creating
25 and depositing RCCs payable to the ZaaZoom Defendants. TAC ¶¶ 100-102. Jack Henry drafted
26 and deposited the RCCs into an account at FNBCT in Jack Henry’s name. TAC ¶ 104. Jack
27 Henry deposited over 116,000 RCCs as a Processor for the ZaaZoom Defendants, of which at least
28 61,000 were returned as not payable, resulting in a return rate of more than 53 percent. TAC ¶¶

1 110-111. There were numerous publicly available warnings and complaints about the ZaaZoom
2 Defendants and their membership programs, about which Jack Henry allegedly knew. MFCC 7.
3 Because Jack Henry received \$0.045 for each RCC it processed and an additional \$0.50 for each
4 RCC that was returned as unauthorized, however, it had a financial incentive to continue to assist
5 the ZaaZoom Defendants' scheme and to ignore the warning signs. MFCC 8 (citing Rosenfeld
6 Decl. ¶ 40, Ex. 23); TAC ¶ 182.

7 FNBCT is a Texas corporation based in Waco, Texas. TAC ¶ 30. FNBCT served as the
8 Depository Bank for ZaaZoom RCCs drafted by Jack Henry. TAC ¶ 177; MFCC Br. 8. It
9 accepted the RCCs for deposit, reviewed and authenticated the RCCs, sent them to the drawee
10 banks, and accepted settled funds. TAC ¶ 178. FNBCT knew each time an RCC was returned,
11 was aware of the excessive return rate, and received complaints from drawee banks. TAC ¶¶ 181,
12 183, 197. Nonetheless, it continued to accept the RCCs from the ZaaZoom Defendants because it
13 received a fee for each returned check. TAC ¶ 182.

14 On January 26, 2011, plaintiff Marsh, without consenting to joining any membership
15 program, was enrolled in one after she applied for a payday loan online, and has had membership
16 fees withdrawn from her bank account. MFCC 7; Marsh Decl. ¶¶ 9-10. Jack Henry or DPS
17 created an RCC from her checking account payable to one of the ZaaZoom Defendants'
18 membership programs. TAC ¶ 211. The RCC was then deposited into an account at FNBCT held
19 in Jack Henry's name. TAC ¶ 212.

20 The ZaaZoom Defendants never actually had a depository account with FNBCT. The
21 RCCs were payable to the ZaaZoom Defendants, but none of the ZaaZoom Defendants endorsed
22 the RCCs. The RCCs simply stated "Authorization On File." MFCC 8 (citing Rosenfeld Decl.
23 ¶ 37, Ex. 20). The RCCs also had "astronomically" high check numbers—plaintiff Marsh's RCC
24 was check number 1,261,849—higher than the number of checks any actual person would issue.
25 TAC ¶ 193. These facts, the plaintiffs allege, should have alerted the defendants to potential
26 wrongdoing. Numerous other individuals have also complained about the ZaaZoom Defendants
27 and their scam. MFCC 9-10.

1 PROCEDURAL HISTORY

2 The plaintiffs filed their TAC on April 10, 2012. Dkt. No. 100. The defendants filed
3 separate motions to dismiss the TAC. Dkt. Nos. 106, 107, 111, 115. Judge Yvonne Gonzales
4 Rogers granted in part and denied in part the motions to dismiss. Dkt. No. 132. The following
5 causes of action remain against Jack Henry: Second Cause of Action under the “unlawful” prong
6 of the UCL on behalf of a California class; Fourth Cause of Action under the “fraudulent” prong
7 of the UCL on behalf of a California class; Sixth Cause of Action under the “unfair” prong of the
8 UCL on behalf of a California class; Seventh Cause of Action for conversion on behalf of a
9 nationwide class; and Ninth Cause of Action for negligence on behalf of a nationwide class. Only
10 the Tenth Cause of Action for negligence on behalf of a nationwide class remains against FNBCT.

11 On December 2, 2013, the Court entered default judgment against defendants Zaazoom
12 Solutions, LLC, Zaza Pay LLC, MultiEcom, LLC, Online Resource Center, LLC, and Automated
13 Electronic Checking, Inc., because they were unrepresented by counsel before the Court as
14 required by Civil Local Rule 3-9(b) and did not respond to an order to show cause why default
15 should not be entered for being unrepresented. Dkt. No. 195.

16 On December 11, 2013, Evans filed an Unopposed Motion for Preliminary Approval of
17 Class Action Settlement with FBD. Dkt. No. 197. The Court preliminarily approved the
18 settlement on January 22, 2013. Dkt. No. 253. The final approval hearing is currently set for June
19 25, 2014.

20 On November 21, 2013, pursuant to an order by Judge Gonzales Rogers, the defendants
21 sought leave to file a motion to strike class allegations. Dkt. No. 193. No opposition was filed, so
22 the Court granted leave on December 3, 2013. Dkt. No. 196. The defendants filed their Motion to
23 Strike Class Allegations on December 13, 2013. Dkt. No. 208.

24 On December 27, 2013, Plaintiff Marsh filed this Motion for Class Certification and for
25 Appointment of Class Counsel. Dkt. No. 214. She seeks to certify the following class under
26 Federal Rules of Civil Procedure 23(a) and 23(b)(3): “All individuals from whom Membership
27 Fees were collected (or who incurred Bank Account Fees in connection with a collection or
28 attempted collection of Membership Fees) by way of remotely created check(s) drafted by

1 Defendant Jack Henry & Associates, Inc. and deposited with First National Bank of Central
2 Texas, from May 6, 2007 to the date of the preliminary approval order.” Jack Henry and FNBCT
3 (hereinafter “defendants”) oppose the motion. Dkt. No. 227. The Court held a hearing on
4 February 5, 2014. Dkt. No. 263.

5 **LEGAL STANDARD**

6 Federal Rule of Civil Procedure 23 governs class actions. “Before certifying a class, the
7 trial court must conduct a ‘rigorous analysis’ to determine whether the party seeking certification
8 has met the prerequisites of Rule 23.” *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588
9 (9th Cir. 2012). The party seeking certification bears the burden of showing that Rule 23 has been
10 met. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *Conn. Ret. Plans & Trust*
11 *Funds v. Amgen Inc.*, 660 F.3d 1170, 1175 (9th Cir. 2011), *aff’d*, 133 S. Ct. 1184 (2013). Rule
12 23(a) requires that plaintiffs demonstrate numerosity, commonality, typicality and adequacy of
13 representation in order to maintain a class action. *Mazza*, 666 F.3d at 588.

14 Rule 23(a) states: “One or more members of a class may sue or be sued as representative
15 parties on behalf of all members only if:

16 (1) the class is so numerous that joinder of all members is impracticable;
17 (2) there are questions of law or fact common to the class;
18 (3) the claims or defenses of the representative parties are typical of the claims or defenses
19 of the class; and

20 (4) the representative parties will fairly and adequately protect the interests of the class.”

21 FED. R. CIV. P. 23(a). Rule 23(b) continues, “A class action may be maintained if Rule 23(a) is
22 satisfied and if” one of three provisions are met. FED. R. CIV. P. 23(b). Subpart (b)(3), the only
23 provision relevant here, states that a class action may be maintained if “the court finds that the
24 questions of law or fact common to class members predominate over any questions affecting only
25 individual members, and that a class action is superior to other available methods for fairly and
26 efficiently adjudicating the controversy. The matters pertinent to these findings include:

27 (A) the class members’ interests in individually controlling the prosecution or defense of
28 separate actions;

1 (B) the extent and nature of any litigation concerning the controversy already begun by or
2 against class members;
3 (C) the desirability or undesirability of concentrating the litigation of the claims in the
4 particular forum; and
5 (D) the likely difficulties in managing a class action.”

6 FED. R. CIV. P. 23(b)(3).

7 While the substantive allegations of the complaint must be accepted as true, issues going to
8 class certification itself are not treated similarly. *Gomez v. Rossi Concrete, Inc.*, 270 F.R.D. 579,
9 585 (S.D. Cal. 2010); *Hanni v. Am. Airlines, Inc.*, No. 08-cv-732-CW, 2010 WL 289297, at *8
10 (N.D. Cal. Jan. 15, 2010); *see also Jordan v. Paul Fin., LLC*, 285 F.R.D. 435, 447 (N.D. Cal.
11 2012) (Illston, J.) (“The Court is obliged to accept as true the substantive allegations made in the
12 complaint.”). “Neither the possibility that a plaintiff will be unable to prove his allegations, nor
13 the possibility that the later course of the suit might unforeseeably prove the original decision to
14 certify the class wrong, is a basis for declining to certify a class which apparently satisfies Rule
15 23.” *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int’l
16 Union, AFL-CIO, CLC v. ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir. 2010) (citation and
17 brackets omitted). “[A] district court retains the flexibility to address problems with a certified
18 class as they arise, including the ability to decertify.” *Id.*

19 DISCUSSION

20 Marsh has carried her burden of meeting the requisites for certification of a class of
21 California residents with regard to each remaining cause of action. However, she has not
22 established that the negligence and conversion claims meet the predominance requirement under
23 Rule 23(b)(3), which would allow for certification of a nationwide class. As explained below, the
24 Order grants the motion for certification but only for a California, not nationwide, class.

25 I. THE CLASS IS ASCERTAINABLE.

26 “Although there is no explicit requirement concerning the class definition in FRCP 23,
27 courts have held that the class must be adequately defined and clearly ascertainable before a class
28 action may proceed.” *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 482 (N.D. Cal. 2011) (White, J.)

1 (citation omitted); *Pecover v. Elec. Arts Inc.*, No. 08-cv-2820-VRW, 2010 WL 8742757, at *8
2 (N.D. Cal. Dec. 21, 2010). “A class is ascertainable if it identifies a group of unnamed plaintiffs
3 by describing a set of common characteristics sufficient to allow a member of that group to
4 identify himself or herself as having a right to recover based on the description.” *Hanni*, 2010 WL
5 289297, at *9 (citation omitted). In other words, “[a]n identifiable class exists if its members can
6 be ascertained by reference to objective criteria.” *Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D.
7 666, 672 (N.D. Cal. 2011) (Henderson, J.) (citation omitted).

8 The proposed class is ascertainable. Neither party independently addresses this element in
9 their briefs on class certification. (Marsh discusses this element as part of her numerosity
10 argument.) The proposed class, however, is simply defined as all individuals who incurred either
11 membership or bank fees through an RCC drafted by Jack Henry and deposited with FNBCT since
12 May 6, 2007. The Court must assess whether it is “administratively feasible to determine whether
13 a particular person is a class member,” and here, Marsh represents that “Defendants have produced
14 records of all RCCs that were drawn—or attempted to be drawn—in Class members’ names.”
15 MFCC Br. 12 (citing Rosenfeld Decl. ¶¶ 28-30, 37, Exs. 12-13, 20). These records “identify
16 which Class members had Membership Fees withdrawn from their accounts and which Class
17 members had the RCCs returned for insufficient funds and thus incurred Bank Account Fees.”
18 MFCC Br. 12 (citing Rosenfeld Decl. ¶¶ 28-29, Exs. 12-13). The RCCs created by Jack Henry
19 were then deposited with FNBCT. TAC ¶¶ 116, 189. Such information renders the proposed
20 class “sufficiently precise, objective and presently ascertainable.” *Wolph*, 272 F.R.D. at 483
21 (citation and quotation marks omitted).

22 **II. RULE 23(a) IS SATISFIED.**

23 **A. The Class Meets The Numerosity Requirement.**

24 Marsh claims that there are approximately 116,000 class members and that this meets the
25 numerosity requirement. MFCC Br. 11-12. The defendants provide no argument on this issue.

26 “Courts have certified classes with far fewer members.” *Immigrant Assistance Project of*
27 *L.A. Cnty. Fed’n of Labor (AFL-CIO) v. I.N.S.*, 306 F.3d 842, 869 (9th Cir. 2002) (affirming class
28 of 11,000 and noting that courts have certified classes with far fewer than 100 members). “As a

1 general rule, classes numbering greater than 41 individuals satisfy the numerosity requirement.”
2 *Davis v. Astrue*, 250 F.R.D. 476, 485 (N.D. Cal. 2008). Marsh has satisfied her burden here.

3 **B. The Class Meets The Commonality Requirement.**

4 “Commonality requires that the class members’ claims depend upon a common contention
5 such that determination of its truth or falsity will resolve an issue that is central to the validity of
6 each claim in one stroke.” *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013)
7 (citation and quotation marks omitted). “Rule 23(a)(2) has been construed permissively.” *Hanlon*
8 v. *Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). “[T]he key inquiry is not whether the
9 plaintiffs have raised common questions . . . but rather, whether class treatment will ‘generate
10 common answers apt to drive the resolution of the litigation.’” *Abdullah*, 731 F.3d at 957 (quoting
11 *Wal-Mart*, 131 S.Ct. at 2551). “This does not, however, mean that every question of law or fact
12 must be common to the class; all that Rule 23(a)(2) requires is ‘a single *significant* question of law
13 or fact.’” *Abdullah*, 731 F.3d at 957 (quoting *Mazza*, 666 F.3d at 589).

14 Marsh argues that if she is able to prove that the ZaaZoom Defendants enrolled all of the
15 proposed class members in coupon programs without their consent after they applied for payday
16 loans online, as alleged in the TAC, then she “will resolve an issue that is central to the validity of
17 each claim.” MFCC 12-13. Marsh maintains that there is no need to individually inquire whether
18 each proposed class member was involuntarily enrolled in a coupon program because, for
19 purposes of class certification, the Court must accept the TAC’s allegations as true, and the TAC
20 asserts that *all* proposed class members were enrolled without their knowledge or consent. MFCC
21 13. She alleges that the ZaaZoom defendants “*never* disclosed that [the proposed class members]
22 were enrolling in an online coupon program”—it is not merely that the class members failed to
23 read any disclosures or misunderstood them. MFCC Reply 2. “[N]o Class member voluntarily
24 enrolled in a Membership Program,” and Jack Henry and FNBCT are alleged to have handled all
25 the ZaaZoom RCCs in the same way. MFCC Br. 4, 13.

26 The defendants argue that each proposed class member’s claim hinges on individual facts.
27 They say that “[n]o individuals fall within the defined class, as payday loan customers were
28 required to affirmatively check a box to enroll themselves in the discount coupon clubs, thereby

1 consenting to the terms.” MFCC Opp’n 6. They assert,

2 In order to assess liability, at a minimum, inquiry must be made into each plaintiffs (1)
3 state of residency, (2) location at the time the subject transactions occurred, (3) date(s) of
4 the subject transactions, (4) understanding, or lack thereof, that s/he was signing up for this
5 program, (5) understanding, or lack thereof, of the terms of the program, (6) what website
6 s/he was using at the time of enrollment, (7) what representations were made on that
7 specific website, (8) whether s/he had to re-input her/his bank account information in
8 compliance with ROSCA, (9) whether s/he recalls affirmatively opting-in to the coupon
9 program, (10) whether s/he made use of the coupon service, (11) whether s/he received one
10 or more confirming emails, (12) whether an RCC was created, (13) if an RCC was created,
11 whether it was rejected, (14) whether a refund was requested, and (15) whether a refund
12 was provided.

13 MFCC Opp’n 6-7.

14 The defendants contend that residency information and the location of the transaction is
15 necessary for each proposed class member because those facts are essential to determining which
16 laws apply to each member’s claims. In addition, the defendants argue that the date of the
17 transaction is necessary to determine whether the federal “Restore Online Shoppers Confidence
18 Act” (“ROSCA”), passed by Congress on December 29, 2010, applies. According to the
19 defendants, ROSCA restricted the practice of “negative option” contracts, e.g., online options that
20 were “pre-checked” and which a consumer had to uncheck in order to avoid enrolling in some
21 program. MFCC Opp’n 3. They argue that Evans, who subscribed to the coupon service on
22 October 25, 2010, would not be covered by ROSCA, whereas Marsh, who subscribed to the
23 coupon service on January 17, 2011, would be covered by ROSCA. MFCC Opp’n 7.

24 The defendants dispute that all proposed class members were enrolled in the coupon
25 programs without their consent. MFCC Opp’n 10-11. Rather, users “were asked to affirmatively
26 check a box on the payday loan websites if they would like to enroll in a coupon club, as
27 evidenced by the screen shots provided in Plaintiffs’ papers.” MFCC Opp’n 11. The defendants
28 assert that commonality cannot be established because “the Court will be required to assess
whether each class member consented to enrollment in the coupon services.” MFCC Opp’n 11.
They further argue that each proposed class member would have to be individually analyzed to
assess whether they understood that they were being signed up for a coupon service “by checking
the box” and what the member intended. Individual analyses will have to be conducted to see

1 “whether an RCC was created, whether that RCC was authorized . . . whether the RCC was
2 rejected, whether a refund was requested, and whether a refund was provided.” MFCC Opp’n 7.

3 Further, the defendants point out that proposed class members “may have different causes
4 of action based on the manner in which they were enrolled in the coupon clubs and the terms of
5 the coupon services in which they were enrolled.” MFCC Opp’n 11. They note that there were
6 multiple payday loan websites through which the ZaaZoom Defendants provided online coupon
7 services, each with different terms of service. MFCC Opp’n 11. According to the defendants,
8 individual factors will therefore exceed any commonality.

9 The defendants’ arguments miss the mark. While they dispute the merits of the TAC’s
10 claims, on a motion for class certification “[t]he court is bound to take the substantive allegations
11 of the complaint as true.” *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975). Accepting
12 the plaintiffs’ legal theory as true renders irrelevant most, if not all, of the 15 issues about which
13 the defendants say the Court must “at a minimum” inquire. For example, the issue of “whether an
14 RCC was created” for a particular proposed class member does not defeat commonality because
15 the Court must, consistent with the TAC, accept as true the allegation that Jack Henry drafted an
16 RCC for every proposed class member without his or her consent. Similarly, the issue of what
17 representations were made to a proposed class member and what his or her understanding of those
18 representations was does not eliminate commonality because the TAC claims that *no* disclosures
19 concerning the coupon programs were made to the proposed class members. MFCC Br. 17. Even
20 if it is true that different coupon programs have different terms, the Court and the jury will still
21 have to determine at the merits stage whether each program failed to disclose that it would enroll
22 the proposed class members—this is a common issue of fact.

23 Marsh has carried her burden of establishing commonality. As the Ninth Circuit has said,
24 “The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion
25 requirements of Rule 23(b)(3)” and are “construed permissively.” *Hanlon*, 150 F.3d at 1019.
26 Marsh must only show “a single *significant* question of law or fact” common to the class.
27 *Abdullah*, 731 F.3d at 957. Under the TAC’s theory of harm, no class member voluntarily
28 enrolled in a coupon program. MFCC Br. 13. In particular, Jack Henry and FNBCT facilitated

1 this “scam” by “drafting, depositing, and settling the RCCs without regard to warning signs” of
2 wrongdoing. MFCC Br. 13. The defendants are accused of the same wrongdoing vis-à-vis all
3 proposed class members. Among other issues to be resolved, questions common to all the
4 proposed class members raised by Marsh’s theory of harm include: whether the defendants knew
5 or should have known of the alleged wrongdoing by the ZaaZoom Defendants but ignored it;
6 whether Jack Henry in fact created RCCs without authorization; whether the check return rate for
7 the ZaaZoom Defendants’ RCCs was unusually high; whether the defendants actions were
8 unlawful, etc. The answers to any of these questions would certainly “drive the resolution of the
9 litigation.” *Abdullah*, 731 F.3d at 957.

10 To meet the commonality requirement, all that Marsh needs to show is *a single* common
11 issue of law or fact among the proposed class members. Here, there are multiple common issues
12 of law and fact.

13 **C. The Class Meets The Typicality Requirement.²**

14 “The purpose of the typicality requirement is to assure that the interest of the named
15 representative aligns with the interests of the class.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497,
16 508 (9th Cir. 1992). “Under the rule’s permissive standards, representative claims are ‘typical’ if
17 they are reasonably co-extensive with those of absent class members; they need not be
18 substantially identical.” *Hanlon*, 150 F.3d at 1020. The test of typicality “is whether other
19 members have the same or similar injury, whether the action is based on conduct which is not
20 unique to the named plaintiffs, and whether other class members have been injured by the same
21 course of conduct.” *Hanon*, 976 F.2d at 508. Importantly, a class representative is not typical if
22 he or she is subject to unique defenses. *Id.*

23 The defendants argue that Marsh is not typical because she and the proposed class
24 members enrolled in different programs on different websites. MFCC Opp’n 13. They argue that
25 Marsh “signed up for the Liberty Discount Coupon Club through the Last Chance Cash Advance

27 _____
28 ² The defendants argue throughout their brief that Stacie Evans does not meet the requirements for
being a class representative. *See, e.g.*, MFCC Opp’n 12, 14. However, only Marsh is seeking to
be appointed class representative. MFCC Br. 2.

1 website” which has different terms of service and costs of enrollment from other websites. MFCC
2 Opp’n 13. The defendants cite to *Stearns v. Ticketmaster Corporation*, a case in which “a number
3 of entities [] were said to have participated in a deceptive internet scheme,” in arguing that Marsh
4 is not typical. 655 F.3d 1013, 1016 (9th Cir. 2011). They argue that the Ninth Circuit, which the
5 defendants call the “California Appellate Court,” “determined that the class representatives were
6 not typical of the proposed class” because one prospective class representative “was not really
7 deceived” into joining a rewards program because he said that he had “accidentally” clicked “Yes”
8 to joining. MFCC Opp’n 12; *Stearns*, 655 F.3d at 1019. Another prospective class representative
9 “never saw the site or signed up for the program” himself, though his son did, and therefore he
10 was found not typical either. *Stearns*, 655 F.3d at 1019. Here, the defendants argue that Marsh
11 “did consent, by affirmatively checking the box to enroll in the coupon programs. Therefore, they
12 are not typical of the proposed class.” MFCC Opp’n 13.

13 Marsh argues that her claims are typical of those of the proposed class. MFCC 13. She
14 applied for a payday loan; she did not voluntarily enroll in a coupon program; she was enrolled in
15 a coupon program; Jack Henry drafted an RCC in her name payable to the ZaaZoom Defendants
16 and deposited it with FNBCT; and she suffered damages because membership fees were drawn
17 from her bank account. MFCC 13. Marsh argues that the proposed class members “suffered the
18 same injury,” i.e., “wrongfully withdrawn Membership Fees and/or Bank Fees.” MFCC Reply 7.
19 In addition, whatever membership program each proposed class member enrolled in, they were all
20 alleged to have been scammed the same way—it does not matter that the membership programs
21 had different names or terms. MFCC Reply 7.

22 Marsh meets the typicality “rule’s permissive standards.” *Hanlon*, 150 F.3d at 1020. Her
23 claims are “reasonably co-extensive” with other class members because they were allegedly
24 injured by similar conduct and suffered similar harm: they were enrolled in a coupon program
25 without their knowledge, a processor drafted an RCC from their bank accounts, and money
26 withdrawn from their account was transferred to a depository bank or they incurred overdraft fees.
27 *Id.* Because “[t]ypicality refers to the nature of the claim or defense of the class representative,
28 and not to the specific facts from which it arose or the relief sought,” *Ellis v. Costco Wholesale*

1 *Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (citation omitted), Marsh has carried her burden here.

2 The defendants make no argument that Marsh is subject to unique defenses sufficient to
3 eliminate her status as a typical class member. They also fail to show that her claims are not
4 “reasonably co-extensive” with other proposed class members. While the defendants argue that
5 Marsh “did consent” to joining a coupon program, as discussed earlier, the Court must accept the
6 plaintiffs’ argument as true. In the TAC, the plaintiffs claim that every proposed class member
7 was deceived in the same manner. Marsh’s allegations are in accord with those claims. *See TAC*
8 ¶¶ 204-212. She is a typical class member.

9 **D. The Class Meets The Adequacy Requirement.**

10 “To satisfy constitutional due process concerns, absent class members must be afforded
11 adequate representation before entry of a judgment which binds them.” *Hanlon*, 150 F.3d at 1020.
12 “To determine whether named plaintiffs will adequately represent a class, courts must resolve two
13 questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other
14 class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously
15 on behalf of the class?” *Ellis*, 657 F.3d at 985 (citation and quotation marks omitted).

16 Marsh asserts that she has actively participated with her attorneys in litigating this case for
17 over 2.5 years. Marsh Decl. ¶ 13. She states that her attorneys have been appointed class counsel
18 in a number of other consumer cases “and have particular experience in the area of consumer fraud
19 perpetrated through net technology.” MFCC Br. 15 (citing Rosenfeld Decl. ¶¶ 2-16; Arias Decl.
20 *passim*). Marsh and her attorneys have opposed several motions to dismiss brought by multiple
21 defendants and have vigorously litigated this case to date. MFCC Br. 15.

22 The defendants argue that Marsh is not an adequate class representative because she
23 “entered a guilty plea to a felony possession of a controlled substance charge” and “a history of
24 drug possession and criminal arrests suggests that Ms. Marsh may not be mentally or physically
25 available to vigorously defend the interests of a class.” MFCC Opp’n 14 (citing Edick Decl. Ex.
26 A). The defendants also question Marsh’s credibility by implying that Marsh lied in her
27 declarations about which websites she used and that her “statements are contradicted by the
28 evidence,” and therefore she is unsuitable to be the class representative. MFCC Opp’n 15.

1 A would-be class representative’s “credibility may be a relevant consideration with respect
2 to the adequacy analysis.” *Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1015 (N.D. Cal.
3 2010) (Chen, J.). “Character attacks made by opponents to a class certification motion and not
4 combined with a showing of a conflict of interest have generally not been sympathetically
5 received in this district,” but “it is self-evident that a Court must be concerned with the integrity of
6 individuals it designates as representatives for a large class of plaintiffs.” *In re Computer
7 Memories Sec. Litig.*, 111 F.R.D. 675, 682 (N.D. Cal. 1986) (Lynch, J.). The “most important[]”
8 issue remains whether the class representative’s “interests are antagonistic to those of the class
9 members.” *Id.* at 683. “Only when attacks on the credibility of the representative party are so
10 sharp as to jeopardize the interests of absent class members should such attacks render a putative
11 class representative inadequate.” *Harris*, 753 F. Supp. 2d at 1015 (citation omitted). There is
12 “inadequacy only where the representative’s credibility is questioned on issues directly relevant to
13 the litigation or there are confirmed examples of dishonesty, such as a criminal conviction for
14 fraud.” *Id.*

15 Marsh has satisfied her burden of showing that she will be an adequate class
16 representative. A guilty plea to a drug charge does not automatically cast doubt on a person’s
17 credibility. The defendants have not explained how Marsh’s ability to represent the class is
18 undermined by her drug-related plea nor shown that she has any conflict with the interests of the
19 proposed class. The defendants’ argument that Marsh “may not be mentally or physically
20 available to vigorously defend the interests of a class” is a wholly unfounded and unwarranted
21 smear. This case has gone on for over two years, but the defendants point to no instance in this
22 litigation in which Marsh failed in her capacity as a plaintiff and would-be class representative.

23 As discussed above, the Court must accept the TAC’s substantive allegations as true for
24 purposes of class certification. Even so, the defendants insist that Marsh’s “statements [in her
25 declarations] are contradicted by the evidence,” and therefore she is unsuitable to be the class
26 representative. MFCC Opp’n 15. All that the defendants cite to for this assertion are nearly 60
27 pages of purported screenshots of webpages, none of which show on their face when (or, indeed,
28 even if) they were online. *See, e.g.*, MFCC Opp’n 15 (citing Crandell Decl. Ex. C). No web

1 address is provided for any of them, and the defendants do not explain from where these
2 screenshots came. There is no evidence that these were the webpages that Marsh or any other
3 proposed class member saw. The Court cannot credit the defendants' attack on Marsh's
4 credibility. She is an adequate class representative.

5 **III. RULE 23(b)(3)**

6 Marsh seeks to certify the proposed class under Rule 23(b)(3). A class action may be
7 maintained under Rule 23(b)(3) if "the court finds that the questions of law or fact common to
8 class members predominate over any questions affecting only individual members, and that a class
9 action is superior to other available methods for fairly and efficiently adjudicating the
10 controversy." FED. R. CIV. P. 23(b)(3). Certification under Rule 23(b)(3) is appropriate
11 "whenever the actual interests of the parties can be served best by settling their differences in a
12 single action." *Hanlon*, 150 F.3d at 1022 (quoting 7A CHARLES ALAN WRIGHT, ARTHUR R.
13 MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1777 (2d ed. 1986)). "This
14 inquiry is more searching" than Rule 23(a)'s inquiry. *Wolph*, 272 F.R.D. at 487.

15 **A. Marsh Fails To Show Predominance.**

16 "[T]he predominance requirement is far more demanding" than the commonality
17 requirement of Rule 23(a). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997). The
18 Rule "presumes that the existence of common issues of fact or law have been established pursuant
19 to Rule 23(a)(2); thus, the presence of commonality alone is not sufficient to fulfill Rule 23(b)(3)." *Id.*
20 *Hanlon*, 150 F.3d at 1022. Unlike the commonality requirement in Rule 23(a), "Rule 23(b)(3)
21 focuses on the relationship between the common and individual issues." *Id.* In other words,
22 "When common questions present a significant aspect of the case and they can be resolved for all
23 members of the class in a single adjudication, there is clear justification for handling the dispute
24 on a representative rather than on an individual basis." *Id.* (quoting 7A CHARLES ALAN WRIGHT,
25 ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1778 (2d ed.
26 1986)).

27 **1. Due Process is not met for non-California residents.**

28 The TAC alleges that the defendants violated California law. "All class members in a Rule

1 23(b)(3) action are entitled to due process” *Hanlon*, 150 F.3d at 1024. “To apply California
2 law to claims by a class of nonresidents without violating due process, the Court must find that
3 California has a significant contact or significant aggregation of contacts to the claims asserted by
4 each member of the plaintiff class, contacts creating state interests, in order to ensure that the
5 choice of the forum state’s law is not arbitrary or unfair.” *Keiholtz v. Lennox Hearth Products*
6 *Inc.*, 268 F.R.D. 330, 339 (N.D. Cal. 2010) (Wilken, C.J.) (internal punctuation omitted) (quoting
7 *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985)). As the Supreme Court explained,
8 application of a particular state’s laws in a class action requires the “modest restriction[]” of that
9 showing before the predominance requirement is met. *Phillips Petroleum Co. v. Shutts*, 472 U.S.
10 797, 821-22 (1985).

11 “[C]onduct by a defendant within a state that is related to a plaintiff’s alleged injuries and
12 is not ‘slight and casual’ establishes a ‘significant aggregation of contacts, creating state
13 interests’” *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1113 (9th Cir. 2013)
14 (citations omitted). “When considering fairness in this context, an important element is the
15 expectation of the parties.” *Shutts*, 472 U.S. at 822. A state “may not abrogate the rights of
16 parties beyond its borders having no relation to anything done or to be done within them.” *Id.*
17 (citation omitted). “The focus of the *Shutts* analysis is on both the plaintiffs’ and defendant[s’]
18 contacts with the forum state.” *Pecover*, 2010 WL 8742757, at *17.

19 What constitutes a “ significant contact” or “significant aggregation of contacts,” and what
20 factors should be considered in the “aggregation” remain murky issues. One judge in this district
21 has noted that both the location of the harm and the location of the wrongdoing can be relevant.
22 See *Pecover*, 2010 WL 8742757, at *18. Accordingly, “product liability claims under California
23 law against a fireplace manufacturer” constituted “contacts sufficient for nationwide class
24 certification despite the fact that most of the defendant’s fireplaces were sold outside California[]
25 [b]ecause 79% of fireplaces were either exclusively or partly manufactured, assembled and
26 packaged inside California.” *Id.* (discussing *Keiholtz*, 268 F.R.D. 330). The location of the
27 defendant’s headquarters is also a factor, *In re Charles Schwab Corp. Sec. Litig.*, 264 F.R.D. 531,
28 538 (N.D. Cal. 2009) (Alsup, J.), as well as where the defendant resides or conducts business,

1 1 *Church v. Consol. Freightways*, No. 90-cv-2290-DLJ, 1992 WL 370829, at *6 (N.D. Cal. Sept.
2 2 14, 1992). Choice-of-law provisions within a party's contracts, in addition to a state's interest in
3 3 regulating the conduct of those within its borders, can also matter. *Pecover*, 2010 WL 8742757, at
4 4 *19.

5 5 In *Mazza v. American Honda Motor Company*, the Ninth Circuit found "a constitutionally
6 6 sufficient aggregation of contacts to the claims of each putative class member . . . because [the
7 7 defendant's] corporate headquarters, [its agent] that produced the allegedly fraudulent
8 8 misrepresentations, and one fifth of the proposed class members are located in California." 666
9 9 F.3d at 590. In *Sullivan v. Oracle Corporation*, a wage-and-hour case, the Ninth Circuit relied on
10 10 both the location of defendant's headquarters and the fact that "the decision to classify Plaintiffs as
11 11 teachers and to deny them overtime pay was made in California" to conclude that the contacts
12 12 were "clearly sufficient" to apply California law to work performed within California by
13 13 nonresident employees. 662 F.3d 1265, 1270-71 (9th Cir. 2011). A judge in this district
14 14 concluded that where 19 percent of a defendant's sales are in California and 76 percent of the
15 15 defendants' goods were partly manufactured, assembled, or packaged at plants in California, there
16 16 is "a significant amount of contact" with the state. *Keilholtz*, 268 F.R.D. at 339-40. One federal
17 17 district court in California held that "maintaining [] corporate headquarters in California during
18 18 the class period and selling approximately 30% of the allegedly misrepresented products in
19 19 California" amounted to a "significant aggregation of contacts with California" even though the
20 20 products were produced out-of-state. *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 538
21 21 (C.D. Cal. 2011). Another federal district court in California found application of California law
22 22 to all class members appropriate where "it is likely that more class members reside in California
23 23 than any other state." *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 598 (C.D. Cal. 2008).

24 24 The defendants argue that the mere fact that (1) the ZaaZoom Defendants' websites were
25 25 operated in California and (2) Jack Henry is registered to conduct business in California and has
26 26 an office in San Diego is insufficient to apply California law. MFCC Opp'n 10. Marsh has not
27 27 shown how FNBCT is connected to California, and Jack Henry is a Delaware corporation. MFCC
28 28 Opp'n 10. Applying California law to a nationwide class is improper because many class

1 members may not have any connection to California and may want to bring their own suits.
2 MFCC Opp'n 10.

3 Marsh, on the other hand, contends that applying California law to the proposed
4 nationwide class does not violate due process. The ZaaZoom Defendants' websites were hosted in
5 California and Jack Henry "is registered to conduct business in California and maintains an office
6 in San Diego . . ." MFCC Br. 18 (citing Rosenfeld Decl. ¶¶ 55-58, Exs. 37-39, 40). Further, at
7 least 5,643 checks out of 61,280 Marsh's counsel reviewed involve a payor in California. MFCC
8 Reply 8 (citing Tamano Decl. ¶ 5 (Dkt. No. 35)). "These contacts constitute significant contacts
9 between California and the Class claims." MFCC Reply 8.

10 Marsh has not carried her burden of showing that California has "a significant contact or
11 significant aggregation of contacts, creating state interests, such that choice of its law is neither
12 arbitrary nor fundamentally unfair." *Shutts*, 472 U.S. at 818. She has not demonstrated that the
13 proposed class members' claims and the parties have enough contacts rising to the levels other
14 courts have found sufficient to meet due process requirements, as discussed above. The TAC
15 itself concedes that "greater than two thirds of the members of all proposed Plaintiff classes in the
16 aggregate are not citizens of California and no Defendant is a citizen of California." TAC ¶ 16.
17 None of the defendants are alleged to be incorporated in California or have their principal place of
18 business in California. TAC ¶¶ 19-33. Marsh has presented almost no evidence about where the
19 defendants' wrongful conduct occurred, such as where they planned the alleged "scam" or took
20 steps to implement it. Nor has she presented sufficient evidence about how many California
21 residents were harmed. Without enough facts to show that the claims here are significantly related
22 to California, due process forbids the application of California law to all the claims.

23 Marsh's arguments to the contrary are unavailing. Marsh asserts that "100% of the
24 supposed enrollments in the Membership Programs occurred in California, where the ZaaZoom
25 Defendants' websites were hosted," MFCC Reply 8, but she points to no authority stating that the
26 hosting location of a website is the relevant location for a contacts analysis as opposed to where
27 the harm occurred or where the actual wrongful conduct leading to the harm took place. She also
28 has presented no evidence that the ZaaZoom defendants knew where the servers hosting their

1 websites were physically located such that they could be fairly said to have expected to be subject
2 to California law.³ *See Shutts*, 472 U.S. at 822 (“When considering fairness in this context, an
3 important element is the expectation of the parties.”). Marsh asserts that “a large portion of Jack
4 Henry’s check processing occurred in California, where Jack Henry maintains a payment
5 processing office,” but provides no evidentiary support for her claim. MFCC Reply 8. Nor does
6 she explain what constitutes a “large portion.” A mere branch office with no connection to the
7 challenged conduct is insufficient to bind non-Californians to California law. While Jack Henry’s
8 office in California is a relevant contact, that means little unless there is evidence that a significant
9 amount of the wrongdoing occurred through that office. And except for the fact that some
10 California residents were harmed, Marsh has presented no evidence linking FNBCT to California.

11 The only other connection to California is Marsh’s residence. Though Marsh’s injury was
12 felt in California, it is only a “slight and casual” connection to California that does not
13 “establish[] a ‘significant aggregation of contacts, creating state interests, such that choice of its
14 law [for all class members’ claims] is neither arbitrary nor fundamentally unfair.’” *AT&T
15 Mobility*, 707 F.3d at 1113. If the defendants’ actions are as widespread as the TAC alleges,
16 affecting hundreds of thousands, if not millions, of people across the country, then the
17 proportional harm she felt is insufficient to impose California’s laws on up to 49 other states’
18 citizens. This is especially true since Marsh fails to show that enough Californians were harmed
19 such that applying California law to a nationwide class would not be “arbitrary” or “fundamentally
20 unfair.”⁴

21 The cases cited by Marsh in her briefs and by her counsel at the hearing do not help her. In
22 *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 550 (W.D. Wash. 2008), a federal court in Washington
23 applied Washington law to a nationwide class action because “Defendant created its allegedly
24 deceptive and unfair marketing scheme in Washington. Defendant is incorporated, does business,

25
26
27 ³ Marsh also has not briefed the issue of whether one defendant’s contacts with the forum can be
attributed to another defendant without such contacts.
28 ⁴ At the hearing, Marsh’s counsel stated that they found some evidence that the ZaaZoom
Defendants had some activities in California. This contention, however, was not discussed in the
briefs and no citation to such evidence was given. The Court will not consider it.

1 and has its principal headquarters in Washington. . . . Further, Defendant contractually required
2 [entities] participating in the allegedly deceptive or unfair scheme to litigate under Washington
3 law.” Such a level of contacts is not present here. In *Keilholtz*, the judge applied California law to
4 a nationwide class action because “the fact that seventy-six percent [of an allegedly defective
5 product] maintained a production connection to California weighs in favor of finding that applying
6 California law to the class claims would not be arbitrary or unfair.” 268 F.R.D. at 340. Marsh has
7 not provided similar numbers: assuming the 5,643 California checks out of 61,280 that Marsh’s
8 counsel reviewed are a suitable proxy for all the RCCs Jack Henry allegedly drafted and FNBCT
9 allegedly deposited, the proportion of California-based payors would amount to a little over nine
10 percent, which the Court finds to be insufficiently “significant” in light of the lack of other
11 contacts with California weighed against substantial out-of-state interests, such as the fact that *at*
12 *least* 66 percent of proposed class members are outside California, none of the defendants are
13 incorporated or headquartered here, and there is no evidence that the defendants’ challenged
14 conduct occurred in California. *See* TAC ¶ 16.

15 Because applying California law to the claims of out-of-state proposed class members
16 would violate due process, other states’ laws may apply to those claims. The Ninth Circuit has
17 stated, “Understanding which law will apply before making a predominance determination is
18 important when there are variations in applicable state law.” *Zinser v. Accufix Research Inst., Inc.*,
19 253 F.3d 1180, 1189. “Variations in state law do not necessarily preclude a 23(b)(3) action, but
20 class counsel should be prepared to demonstrate the commonality of substantive law applicable to
21 all class members.” *Hanlon*, 150 F.3d at 1022 (discussing predominance factor).

22 In *Zinser v. Accufix Research Institute, Inc.*, the court said that because the plaintiff “seeks
23 certification of a nationwide class for which the law of forty-eight states potentially applies, she
24 bears the burden of demonstrating ‘a suitable and realistic plan for trial of the class claims.’” 253
25 F.3d at 1189 (citation omitted). The same is true of Marsh here. However, Marsh has not told the
26 Court from which states potential class members are from, how many potential class members are
27 in each state, whether a given state’s law may apply to this case, and whether she has “a suitable
28 and realistic plan for trial of the class claims.” *Id.* She therefore fails to show that the

1 predominance element in Rule 23(b)(3) has been met.

2 Citing other cases, the Ninth Circuit recognized that a “district court abused its discretion
3 certifying [a] class because plaintiffs did not show how class trial could be conducted,” and a
4 “court cannot rely merely on assurances of counsel that any problems with predominance or
5 superiority can be overcome” because “when more than a few state laws differ, [the] court would
6 be faced with impossible task of instructing jury on relevant law.” *Id.* (citations omitted). It may
7 very well be the case that all applicable state laws are nearly identical with California’s law on
8 conversion and negligence, but it is Marsh’s burden to show this, and she has not done so.⁵
9 Accordingly, the proposed nationwide classes fail.

10 Marsh can still maintain a California subclass. Currently, the TAC only brings the
11 conversion and negligence causes of action on behalf of a nationwide class, but the Court will
12 allow amendment of the complaint so that a California subclass may proceed. In addition, the
13 Ninth Circuit has found it proper for plaintiffs to make a “renewed motion for certification only
14 after the plaintiffs created subclasses with proper representatives for each” if there are different
15 classes based on the laws of relevant states. *Id.* (citing *In re Electronics Pacing Sys., Inc.*, 172
16 F.R.D. 271, 277 (S.D. Ohio 1997)). The Court will also allow a renewed motion for certification
17 if Marsh is able to propose “a suitable and realistic plan for trial of the class claims.” *Id.*

18 **2. California’s law applies to the California class.**

19 “When a federal court sitting in diversity hears state law claims, the conflicts laws of the
20 forum state are used to determine which state’s substantive law applies.” *Orange Street Partners*
21 *v. Arnold*, 179 F.3d 656, 661 (9th Cir. 1999). “[S]o long as the requisite significant contacts to
22 California exist, a showing that is properly borne by the class action proponent, California may
23 constitutionally require the other side to shoulder the burden of demonstrating that foreign law,
24 rather than California law, should apply to the class claims.” *Parkinson*, 258 F.R.D. at 597
25 (quoting *Wash. Mut. Bank, FA v. Super. Ct. of Orange Cnty.*, 24 Cal. 4th 906, 921 (2001)).

26 Marsh argues that California law applies to this case. Therefore, the defendants have the
27 “burden of demonstrating that foreign law, rather than California law, should apply to the class

28 ⁵ At the hearing, Marsh’s counsel noted that there may be some variation in state laws.

1 claims.” *Parkinson*, 258 F.R.D. at 597. The defendants have made no such argument. Therefore,
2 California law applies.

3 **B. A Class Action Is The Superior Method Of Resolving This Action.**

4 “Where classwide litigation of common issues will reduce litigation costs and promote
5 greater efficiency, a class action may be superior to other methods of litigation.” *Valentino v.*
6 *Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). “The superiority inquiry under Rule
7 23(b)(3) requires determination of whether the objectives of the particular class action procedure
8 will be achieved in the particular case.” *Hanlon*, 150 F.3d at 1023. “Where classwide litigation of
9 common issues will reduce litigation costs and promote greater efficiency, a class action may be
10 superior to other methods of litigation. A class action is the superior method for managing
11 litigation if no realistic alternative exists.” *Valentino*, 97 F.3d at 1234-35 (citation omitted).

12 Marsh argues that a class action is the superior method to adjudicate the proposed class
13 members’ claims because the cost of individual litigation would be prohibitive given that the
14 damages for any single plaintiff would be small and no more than a few hundred dollars. MFCC
15 Br. 20. There are no other actions like this one, suggesting that the cost of litigation outweighs
16 any potential benefit. MFCC Reply 13. If this action does not proceed, Marsh insists, the
17 proposed class members would not be able to obtain redress. A class action would “provide for a
18 streamlined method to resolve this controversy . . . in a single forum.” MFCC Reply 13.

19
20 A class action is the “superior” method for resolving this action. As Marsh has shown,
21 each proposed class members’ recovery is likely to be too low for that person to bring an
22 individual action. *See, e.g., Shutts*, 472 U.S. at 809 (finding that where a case “involves claims
23 averaging about \$100 per plaintiff[,] most of the plaintiffs would have no realistic day in court if a
24 class action were not available”); *Wolph*, 272 F.R.D. at 489 (finding that claims up to \$600 per
25 class member make it “unfeasible and impracticable for each class member to institute an
26 individual claim for relief, making class treatment more efficient than litigating on an individual
27 basis”). The fact that the named plaintiffs have filed this action in this Court and have litigated it
28 for over two years also weighs in favor of maintaining a class action here. FED. R. CIV. P.

1 23(b)(3)(C). On the other hand, there is no evidence before the Court of any other private actions
2 against any of the defendants alleging the same misconduct or that any likely class member has an
3 interest in prosecuting a separate action. FED. R. CIV. P. 23(b)(3)(A)-(B). Although the
4 defendants argue that class action treatment is not superior because they believe individual
5 questions will predominate, the Court has already rejected this argument. This action satisfies
6 Rule 23(b)(3)'s superiority requirement.⁶

7 **IV. THE MOTION TO APPOINT CLASS COUNSEL IS GRANTED.**

8 Marsh argues that her attorneys should be appointed as class counsel because they have
9 been litigating this case for over two years, have special expertise in consumer fraud cases
10 involving technology, and have been working diligently on this case. MFCC 20-21.

11 Rule 23(g) governs the appointment of class counsel. A court must consider: (1) "the
12 work counsel has done in identifying or investigating potential claims in the action"; (2)
13 "counsel's experience in handling class actions, other complex litigation, and the types of claims
14 asserted in the action"; (3) "counsel's knowledge of the applicable law"; and (4) "the resources
15 that counsel will commit to representing the class." FED. R. CIV. P. 23(g)(1)(A). In addition, a
16 court may consider "any other matter pertinent to counsel's ability to fairly and adequately
17 represent the interests of the class." FED. R. CIV. P. 23(g)(1)(B).

18 The Court concludes that Marsh's counsel should be appointed class counsel. Marsh's
19 counsel brought this action, litigated it for over two years, and has maintained the action through
20 many rounds of motion practice. There is no evidence before the Court that Marsh's counsel has

21
22 ⁶ The defendants argue that there are other methods to remedy the plaintiffs' claims. Proposed
23 class members "may request re-credits from their banks for unauthorized RCC's. Their payment
24 banks then may request a charge back from the depository bank, resulting in a credit to the
25 plaintiffs account and full compensation." MFCC Opp'n 15. "To bring this class action, and
26 address each complex issue of law and fact to assess each plaintiff's individual claims," the
27 defendants assert, "is a waste of judicial resources when plaintiffs have an alternative, complete
28 remedy." MFCC Opp'n 15. Marsh responds that California Commercial Code section 4406
limits a person's time to notify his or her bank of an unauthorized payment to 30 days. MFCC
Reply 12. Further, each proposed class member would have to individually seek redress from his
or her own bank, which would in turn have to seek a refund from the depository banks on a check-
by-check basis. This, Marsh argues, is even more complicated and impractical. MFCC Reply 13.
The parties have not sufficiently briefed this issue, so the Court does not decide it. In any event,
the superiority of the class action as a method to resolve this matter is evident.

1 interests which conflict with those of the class or that they cannot vigorously prosecute this case.
2 Rule 23(g)'s factors are met.

3 **V. THE MOTION TO STRIKE CLASS ALLEGATIONS IS DENIED AS MOOT.**

4 The defendants have filed a Motion to Strike Class Allegations. Dkt. No. 208. Rule 12(f)
5 authorizes courts to strike "from any pleading any insufficient defense or any redundant,
6 impertinent, or scandalous matter." A motion to strike class allegations may be appropriate to
7 dispense with issues well before trial or before discovery is taken. *See Sanders v. Apple Inc.*, 672
8 F. Supp. 2d 978, 99091 (N.D. Cal. 2009) (Fogel, J.). "Thus, some courts have struck class
9 allegations where it is clear from the pleadings that class claims cannot be maintained." *In re*
10 *Clorox Consumer Litig.*, 894 F. Supp. 2d 1224, 1237 (N.D. Cal. 2012) (Conti, J.). Generally,
11 "motions to strike class allegations are disfavored because a motion for class certification is a
12 more appropriate vehicle for arguments about class propriety." *Hibbs-Rines v. Seagate*
13 *Technologies, LLC*, No. 08-cv-5430-SI, 2009 WL 513496, at *3 (N.D. Cal. Mar. 2, 2009).
14 Motions to strike class allegations are more common and aptly brought before discovery has
15 commenced. *Id.*

16 In light of the Court's ruling on class certification, the defendants' motion to strike class
17 allegations is DENIED AS MOOT.

18 **CONCLUSION**

19 Based on the foregoing, the Court CERTIFIES a class defined as follows: "All individuals
20 from whom, and who were California residents when, Membership Fees were collected (or who
21 incurred Bank Account Fees in connection with a collection or attempted collection of
22 Membership Fees) by way of remotely created check(s) drafted by Defendant Jack Henry &
23 Associates, Inc., and deposited with First National Bank of Central Texas, from May 6, 2007, to
24 the date of the preliminary approval order."

25 Plaintiff Amber Kristi Marsh is APPOINTED Class Representative.

26 Marsh's counsel, Kronenberger Rosenfeld, LLP, and Arias Ozzello & Gignac, LLP, are
27 APPOINTED Class Counsel.

28 If Marsh wishes to proceed with only a California class, within seven days, Marsh shall file

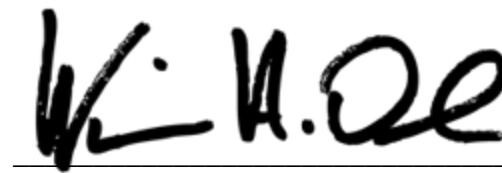
1 an amended complaint that only modifies the causes of action for convergence and negligence to
2 be on behalf of a California class. *See Wolph*, 272 F.R.D. at 489 (granting “leave to amend the
3 complaint to conform the class definition to the [court’s] modified definition of the class”). The
4 Court will treat the defendants’ Answers to the TAC (Dkt. Nos. 136, 137) as the operative answers
5 to any amended complaint.

6 If Marsh wishes to make a renewed motion for certification of a nationwide class or
7 multiple subclasses, within seven days, Marsh shall so notify the Court through a separate notice.
8 Within 45 days thereafter, Marsh may file an amended motion for class certification that addresses
9 the deficiencies identified in this Order by, among other things, identifying the states of residency
10 for proposed class members, explaining with particularity whether any other state’s laws apply and
11 how they relate to California law, and providing “a suitable and realistic plan for trial of the class
12 claims.” *Zinser*, 253 F.3d at 1189. The Court will then determine whether predominance has
13 been shown for the nationwide class or subclasses. The motion will be heard in accordance with
14 Civil Local Rule 7.

15 The Motion to Strike Class Allegations is DENIED AS MOOT.

16 **IT IS SO ORDERED.**

17 Dated: February 7, 2014



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19 WILLIAM H. ORRICK
20 United States District Judge
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